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## CLIFF SMITH,

Appellant,

V.

COMMUNITY COLLEGES OF SPOKANE.

Respondent.

Case No. DISM-01-0002

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held at Spokane Community College in Spokane, Washington, on October 17 and 18, 2001. LEANA D. LAMB, Member, did not participate in the hearing or in the decision in this matter.

1.3 **Nature of Appeal.** This is an appeal from the disciplinary sanction of dismissal for neglect of duty, abuse of fellow workers, insubordination, and willful violation of published institution/related board and higher education personnel rules and regulations. Respondent alleged that Appellant used a computer without proper authorization on two occasions during his regular work hours. Respondent also alleged that Appellant was out of his work area during work hours and used profanity in the presence of his co-workers.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Johnson v. Lower Columbia College, PAB No. D93-077 (1994); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995); Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

## II. FINDINGS OF FACT

2.1 Appellant Cliff Smith was a Custodian and permanent employee of Respondent Community Colleges of Spokane (CCS) at Spokane Community College. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal on January 16, 2001.

2.2 By letter dated December 14, 2000, Dr. Charles A. Taylor, Chancellor and Chief Executive Officer for CCS, notified Appellant of his dismissal effective January 5, 2001, for neglect of duty, abuse of fellow workers, willful violation of the published employing institution/related board or higher education personnel rules and regulations, and insubordination. Dr. Taylor alleged that Appellant misused a computer, was out of his work area during work hours, and used profanity in the presence of his co-workers.

2.3 Appellant began employment with CCS in September 1997. He attended ethics training and anti-harassment training on December 22, 1999. During the training, Appellant was made aware of the guidelines for use of state resources and of the CCS Dignity Statement setting forth the expectation that CCS employees treat every person with dignity and respect.

2.4 Appellant's Employee Development and Performance Plan (EDPP) for the period of February 1, 1999 through February 1, 2000, set forth the expectation that he focus on his job during

1 work hours and to not be side tracked by other activities such as using computers. In addition, the  
2 EDPP brought to Appellant's attention that some of his co-workers expressed some fear of him  
3 because of his general tone of voice and confrontational manner of conversation.

4  
5 2.5 In November 1998, Ronald E. Bell, the Chancellor/Chief Executive Officer for CCS,  
6 distributed to all CCS employees guidelines for acceptable uses of CCS resources. The guidelines  
7 stated, in part, that CCS resources may be used on an occasional and limited basis for personal  
8 reasons when such use does not interfere with an employee's official duties, is brief in duration and  
9 complies with all applicable laws and regulations. Appellant was aware of these guidelines.

10  
11 2.6 CCS Policy 1.70.07 requires that all district resources for electronic communications and  
12 messaging be used for legitimate district business in compliance with all applicable laws, rules,  
13 regulations and executive orders. WAC 292-110-010(2) prohibits state employees from using state  
14 resources for private benefit. Appellant was aware of the policy and the WAC.

15  
16 2.7 In the fall of 1999, CCS information services (IS) staff informed Rebecca Crow, District  
17 Facilities Operations Manager, that a significant amount of computer usage was occurring between  
18 the hours of 10 p.m. and 6 a.m. IS staff isolated the areas in which the computers were being used.  
19 Ms. Crow interviewed the custodial employees working in those areas and learned that some of the  
20 employees had been engaging in excessive computer use during their regular work hours.  
21 Appellant admitted that he had been using the computer during his normal working hours, that he  
22 did not have permission to use the computer, and that he was not performing his assigned duties  
23 when he was using the computer. By letter dated October 22, 1999, Appellant was informed that  
24 his actions violated district policies and state law and was warned that further violations would be  
25 grounds for discipline.

1 2.8 On October 21, 1999, Greg Plummer, District Director of Facilities, issued a memorandum  
2 to all building and grounds employees. Appellant received a copy of the memo. Mr. Plummer's  
3 memo outlined acceptable use of computers and informed employees that they were not to use  
4 computers during regular working hours, excluding lunch breaks, and that if they desired to use a  
5 computer in another department, the administrator responsible for that department must give written  
6 permission indicating the specific computer and the authorized times the employees could use the  
7 computer. The written permission was to be given to the appropriate Buildings and Grounds  
8 supervisor. The memo did not specify who was responsible for obtaining the written permission  
9 and providing it to the supervisor. Furthermore, Mr. Plummer did not provide a form or indicate a  
10 recommended method for obtaining and providing the written permission.

11  
12 2.9 The incidents giving rise to this appeal occurred between June 21, 2000 and August 20,  
13 2000. During this time, Appellant worked a summer schedule consisting of four days per week  
14 beginning at 2 p.m. and ending at 12:30 a.m. Employees assigned to this shift took their first break  
15 at 4:30 p.m., lunch at 7 p.m., and their second break at 10 p.m. The summer schedule breaks and  
16 lunch times were discussed during a 9 p.m. staff meeting on June 21, 2000. In addition, computer  
17 use was discussed during the staff meeting, which Appellant attended.

18  
19 2.10 On June 21, 2000, Appellant was assigned to clean the lower south and culinary areas of  
20 Building 1. Both the lower south and the culinary areas are located on the ground floor of the  
21 building. At approximately 9:45 p.m., Appellant went to the Liberal Arts Center in the Business  
22 Technology area located on the second floor of Building 1. Appellant told Bob Galveso, one of the  
23 Custodians assigned to the area, that he was going to use the computer.

24  
25 2.11 Mr. Galveso's co-worker, Custodian Pam Earney, overheard the conversation between  
26 Appellant and Mr. Galveso. Subsequently, she telephoned Phyllis Prescott, Maintenance Custodian

1 Supervisor, and reported that Appellant was using the computer. Because she was off campus when  
2 she received the call, Ms. Prescott telephoned Claude DeFour, Maintenance Custodian Supervisor.  
3 Mr. DeFour went to the Building 1 and when he arrived at room 1220, he found Appellant using the  
4 computer. Mr. DeFour checked the time and it was 10:35 p.m.

5  
6 2.12 Mr. DeFour asked Appellant what he was doing and Appellant said that he was using the  
7 computer during his break. Mr. DeFour then discussed with Appellant the requirements of Mr.  
8 Plummer's memo in regard to computer use and reiterated for Appellant that he needed written  
9 permission from the appropriate administrator before he could use the computer. Appellant  
10 indicated that he understood the policy. Mr. DeFour composed a handwritten summary of their  
11 conversation and both he and Appellant signed it.

12  
13 2.13 At the end of the shift on June 21, 2000, Appellant's co-workers were outside of the plant  
14 building. At approximately 12:20 a.m., Appellant confronted some of his co-workers about the  
15 events that had transpired earlier that evening. Appellant used profanity and expressed himself in a  
16 loud voice. Appellant appeared very angry and his co-workers felt intimidated by his tone of voice  
17 and demeanor.

18  
19 2.14 Mr. DeFour reported the incident to Barry Hayes, Campus Facilities Manager. On June 22,  
20 2000, Mr. Hayes began an investigation into Appellant's June 21 computer related activities. Mr.  
21 Hayes completed his report on August 1, 2000. However, before his report was completed, on July  
22 26, 2000, Appellant was again observed using the computer.

23  
24 2.15 At approximately 10:05 p.m. on June 26, 2000, Mr. Galveso was working in the Liberal Arts  
25 Center of Building 1. He saw Appellant enter the area and they spoke briefly. Appellant told him

1 that he was going to check his e-mail on the computer. Appellant indicated that he had permission  
2 to use the computer from two people. Appellant used the computer for approximately ten minutes.

3  
4 2.16 Prior to using the computer on June 21 and 26, Appellant had sought permission from Susan  
5 Curtin, Program Support Supervisor in the Liberal Arts Center. Ms. Curtin gave Appellant oral  
6 permission to use the computer during his breaks or at the end of his shifts. However, Ms. Curtin is  
7 not the administrator for the area and she did not put her permission in writing.

8  
9 2.17 Appellant also sought permission to use the computer in the Multi-Cultural Building from  
10 Francisco Salinas, the supervisor for the multi-cultural area. Mr. Salinas gave Appellant oral  
11 permission to use the computer during his lunch and breaks. Mr. Salinas is not the administrator for  
12 the area and he did not provide his permission in writing. Although Appellant had oral permission  
13 from Mr. Salinas, he did not use the computer in the Multi-Cultural Building on June 21 or 26. By  
14 e-mail dated 10:36 a.m. on August 2, 2000, Terri McKenzie, the administrator for the multi-cultural  
15 building, confirmed in writing that Appellant had permission to use the computer in that area.

16  
17 2.18 During the summer of 2000, custodial staff had weekly staff meetings at 8 p.m. on  
18 Wednesdays. On August 2, 2000, Appellant was not present at the staff meeting. After the  
19 meeting, Mr. DeFour left a note for Appellant to call him. Appellant contacted Mr. DeFour at  
20 approximately 9:15 p.m. and Mr. DeFour asked Appellant where he had been during the staff  
21 meeting. Appellant indicated that he had left campus for lunch and had gotten a flat tire. Mr.  
22 DeFour told Appellant that he should have called in. Neither Mr. DeFour nor Appellant's co-  
23 workers knew where Appellant was or that he would be late returning to work. Appellant and Mr.  
24 DeFour met in the office located in the plant building. Appellant became upset and he and Mr.  
25 DeFour engaged in a loud conversation during which Appellant appeared angry and used profanity.

1 2.19 Ms. Prescott and Claudia Toews, Custodian, overheard the conversation between Mr. DeFour  
2 and Appellant. During the conversation, Appellant used profanity in a hostile and threatening  
3 manner. Ms. Prescott and Ms. Toews were concerned for Mr. DeFour's safety and they decided to  
4 stay in the area in case Mr. DeFour needed them.

5  
6 2.20 While Appellant's co-workers felt that he could be intimidating and appeared threatening  
7 because of his loud voice and imposing stature, Appellant had never personally threatened or  
8 harmed any of his co-workers.

9  
10 2.21 Mr. Hayes investigated the allegations against Appellant. He prepared two reports  
11 containing his findings. He forwarded his reports to Rebecca Crow. Ms. Crow concurred with the  
12 findings in the reports and forwarded the information to Greg Plummer. Mr. Plummer reviewed the  
13 information and talked with Ms. Crow and Mr. Hayes. Mr. Plummer concurred with the findings in  
14 the report and determined that Appellant repeatedly misused the computer and created a hostile  
15 work environment in which his co-workers feared him. Mr. Plummer found that Appellant's  
16 misconduct violated the trust CCS and the public placed in the college's employees and adversely  
17 affected employee morale and productivity. Mr. Plummer decided that termination was the  
18 appropriate disciplinary sanction and forwarded the investigative information and his  
19 recommendation to Dr. Charles A. Taylor, Chancellor and Chief Executive Officer for CCS.

20  
21 2.22 Dr. Taylor was Appellant's appointing authority. After being advised of the allegations  
22 against Appellant, on October 27, 2000, Dr. Taylor held a pre-termination hearing with Appellant  
23 and his representative. After considering Appellant's responses to the allegations, and reviewing  
24 documentation, Dr. Taylor concurred with Mr. Plummer's recommendation that Appellant be  
25 terminated. Dr. Taylor determined that Appellant had been made aware of the rules and regulations  
26 several times, yet he chose to willfully violate the computer use policy, ignore the directions given

1 to him by his supervisor, used profanity in a hostile matter, and create an intimidating and hostile  
2 work environment for fellow employees. Dr. Taylor concluded that Appellant's continued  
3 employment would create an offensive environment and undermine the college's ability to carry out  
4 its mission of higher learning and its ability to fulfill its obligation to provide a work environment  
5 where employees were treated with respect and dignity.

### 7 **III. ARGUMENTS OF THE PARTIES**

8 3.1 Respondent argues that Appellant was aware of the policy and the directives in Mr.  
9 Plummer's memorandum regarding computer use. Respondent contends that Appellant openly  
10 defied the policy and directive when he went outside of his assigned work area to use a computer  
11 without first obtaining written permission and when he used the computer during normal work  
12 hours rather than on his breaks or during his lunch. Respondent asserts that after the incident on  
13 June 21, a reasonable person would have obtained proper permission before using the computer, but  
14 Appellant again chose to blatantly defy the policy and Mr. Plummer's directive and ignored Mr.  
15 DeFour's counseling by using the computer on June 26. Respondent contends that Appellant  
16 refused to accept responsibility for his misconduct in using the computer and refused to accept  
17 responsibility for his failure to report his absence following lunch on August 2. Respondent asserts  
18 that instead of accepting responsibility for his actions, Appellant responded loudly and with  
19 hostility and disrespect which created fear among his co-workers. Respondent contends that in light  
20 of the negative impact of Appellant's behavior on the department and his co-workers, dismissal was  
21 appropriate.

22  
23 3.2 Appellant argues that he did not clearly understand Mr. Plummer's directive until he met  
24 with Mr. DeFour on June 21. Appellant contends that he assumed it was permissible for him to use  
25 the computer on June 26 because he was in the process of obtaining written permission as required  
26 by the directive. Appellant contends that he had been given conflicting information regarding



1 computer use, but believed that he was complying with the CCS expectations. Appellant asserts  
2 that he is a compassionate, respectful, honest person who was antagonized to the point of using  
3 profanity. Appellant argues that he is not a threat to his fellow employees. Appellant suggests that  
4 this disciplinary action was racially motivated and was in retaliation for him filing a grievance  
5 against the college. Appellant contends that the college's treatment of him was meant to humiliate  
6 and dehumanize him. Appellant argues that his dismissal was not warranted.

#### 8 IV. CONCLUSIONS OF LAW

9 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
10 herein.

11  
12 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
13 the charges upon which the action was initiated by proving by a preponderance of the credible  
14 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
15 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
16 Corrections, PAB No. D82-084 (1983).

17  
18 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
19 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
20 of Social & Health Services, PAB No. D86-119 (1987).

21  
22 4.4 Abuse of fellow employees is established when it is shown that the employee wrongfully or  
23 unreasonably treats another by word or deed. Johnson v. Lower Columbia College, PAB No. D93-  
24 077 (1994)

1 4.5 Insubordination is the refusal to comply with a lawful order or directive given by a superior  
2 and is defined as not submitting to authority, willful disrespect or disobedience. Countryman v.  
3 Dep't of Social and Health Services, PAB No. D94-025 (1995).

4  
5 4.6 Willful violation of published employing agency or institution or Personnel Resources  
6 Board rules or regulations is established by facts showing the existence and publication of the rules  
7 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
8 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &  
9 Health Services, PAB No. D93-053 (1994).

10  
11 4.7 Respondent has proven that Appellant did not have written authorization to use the  
12 computer in the Liberal Arts Center, that on June 21, 2000, Appellant used the computer for a  
13 period of time longer than his authorized break time, that Appellant used a computer that was not in  
14 his assigned work area, and that he used profanity in the presence of his co-workers and during his  
15 August 2, 2000 conversation with Mr. DeFour. Appellant's unauthorized computer use for a period  
16 longer than his authorized break time constituted a neglect of duty, insubordination, and violation of  
17 college policy and WAC 292-110-010. Furthermore, Appellant's use of profanity constituted abuse  
18 of his fellow workers. Respondent failed to prove that Appellant committed misconduct when he  
19 used a computer that was not in his assigned work area and failed to prove that Appellant created an  
20 intimidating and hostile work environment for his fellow employees.

21  
22 4.8 In determining whether a sanction imposed is appropriate, consideration must be given to  
23 the facts and circumstances including the seriousness and circumstances of the offense. The penalty  
24 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent  
25 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.

1 An action does not necessarily fail if one charge is not sustained unless the entire action depends on  
2 the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

3  
4 4.9 Under the proven facts and circumstances of this case, dismissal is too severe. Several  
5 factors mitigate the severity of Appellant's misconduct. First, CCS policy and particularly Mr.  
6 Plummer's memorandum are vague. Mr. Plummer's memo does not specify the level of  
7 administrators who are authorized to give permission to an employee to use a computer and does  
8 not specify who is responsible for providing the written permission to the requesting employee's  
9 supervisor. Respondent should develop a clear procedure and a form that encompasses the  
10 requirements of the guidelines and complies with the intent of Mr. Plummer's memo. Secondly,  
11 Appellant did not attempt to be deceptive in his use of the computer. Third, Respondent failed to  
12 establish that Appellant's use of profanity negatively impacted his ability to work with his co-  
13 workers or supervisors or that any of his fellow workers were afraid to work with him.

14  
15 4.10 On the other hand, Appellant is not entirely without fault. Appellant should have sought  
16 clarification if he was unclear about the computer use directives and should have restricted his  
17 computer use to authorized breaks and lunch times. Furthermore, Appellant's use of profanity was  
18 totally unacceptable regardless of whether he felt provoked or antagonized. In light of Appellant's  
19 proven misconduct and his egregious, excessive use of profanity on both June 26 and August 2, a  
20 severe disciplinary sanction is appropriate. In this case a suspension effective January 5, 2001 until  
21 the date of this order is sufficient to prevent recurrence, to deter others from similar misconduct,  
22 and to maintain the integrity of the program.

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**V. ORDER**

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Cliff Smith is granted in part and the disciplinary sanction of dismissal is modified to a suspension without pay effective January 5, 2001 until the date of this order.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

WASHINGTON STATE PERSONNEL APPEALS BOARD

\_\_\_\_\_  
Walter T. Hubbard, Chair

\_\_\_\_\_  
Gerald L. Morgen, Vice Chair